

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDING CORPORATION,

8 Debtor.

9

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11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 December 3, 2021

17 2:03 PM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 Notice of Agenda of Matters Scheduled for Hearing to be
2 Conducted Through Zoom on December 3, 2021 at 2:00 P.M.

3
4 HEARING re Motion to Shorten Time / Motion for an Order
5 Shortening Notice with Respect to Debtors Motion Pursuant to
6 Fed. R. Bankr. P. 9019(a) for Entry of an Order Approving
7 Settlement Agreement Regarding the EDA Litigation and Tax
8 Assessment Issues (related document(s)10101)

9
10 HEARING re Motion to Approve Compromise / Debtors Motion
11 Pursuant to Fed. R. Bankr. P. 9019(a) for Entry of an Order
12 Approving Settlement Agreement Regarding the EDA Litigation
13 and Tax Assessment Issues

14
15 Declaration of Brian J. Griffith in Support of Debtors'
16 Motion Pursuant to Fed. R. Bankr. P. 9019(a) for Entry of an
17 Order Approving Settlement Agreement Regarding the EDA
18 Litigation and Tax Assessment Issues (related
19 document(s)10101) filed by Jared R. Friedmann on behalf of
20 Sears Holdings Corporation. (ECF #10102)

1 Declaration of David S. Martin in Support of Debtors' Motion
2 Pursuant to Fed. R. Bankr. P. 9019(a) for Entry of an Order
3 Approving Settlement Agreement Regarding the EDA Litigation
4 and Tax Assessment Issues (related document(s)10101) filed
5 by Jared R. Friedmann on behalf of Sears Holdings
6 Corporation. (ECF #10103)

7
8 Affidavit of Service of Victor Wong Regarding Motion re
9 Settlement and Release, Notice of Motion re Settlement,
10 Griffith Declaration, Martin Declaration, Notice of
11 Shortening Motion, and FTI Fee App (related
12 document(s)10101, 10100, 10103, 10099, 10102, 10104) filed
13 by Prime Clerk, LLC. (ECF #10112)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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P R O C E E D I N G S

THE COURT: This is Judge Drain. Good afternoon, everyone. We're here in In re Sears Holdings Corp., et al appearing virtually by Zoom, unless someone doesn't have a screen, in which case they're appearing by phone.

I have the agenda for this afternoon's hearing and there are two matters on it. They're both related to each other. I have the Debtors' underlying motion for authority to enter into a settlement agreement with a number of parties, including the Village of Hoffman Estates and the School District 300 that's been the subject of a lot of litigation in this Court and elsewhere, and others of course besides those two parties.

And in addition, and I should take this first, I have the Debtors' motion for an order permitting the first motion to be heard on shortened notice, so why don't we address that motion first.

MR. FRIEDMANN: Good afternoon, Your Honor. Jared Friedmann from Weil, Gotshal & Manges on behalf of the Debtor.

Yes, Your Honor, the first motion that makes sense to address was filed at ECF 10104, which is starting to sound like a Bates number and less like an ECF number at this point. We moved to shorten time. We filed on November 23rd, 2021.

1 The rationale for it, as is laid out in the motion
2 to shorten notice, is that because of the intricacies of the
3 tax laws that require the Village of Hoffman Estates to
4 publish an ordinance resolving the EDA prior to December
5 31st, we wanted to make sure we were before this Court in
6 time in order to get an order approving Debtors to enter
7 into the global settlement agreement, and also approving the
8 settlement agreement in time so that the 14 days could then
9 pass, the order would become final and not appealable.

10 And at that point, the Village would be able to
11 publish and enter this ordinance which would dissolve the
12 EDA; that's a triggering point for the settlement agreement
13 whereby the payments, including the payment to the Debtors
14 would be five days after that.

15 But again, because of that December 31st deadline,
16 notwithstanding our efforts to get all this to you months
17 ago, it turned out to be a complicated process and a lot of
18 taxing districts involved, and that's why we got to a point
19 where we have to have this heard on a shortened notice, and
20 I'll note that there were no objections to that request.

21 THE COURT: Right, okay. I'm not seeing anyone
22 seeking to say anything more on this motion, which is
23 consistent with it being unopposed.

24 I'll grant the motion. I very rarely shorten
25 notice ex parte. I prefer giving people the opportunity if

1 I think there's a reasonable basis to have shortened notice
2 to at least object on the requested hearing date to the
3 motion to shorten. There have been no objections here. It
4 was served on the 23rd.

5 And based on my review of the motion, there
6 clearly is cause under Rule 9006 to shorten notice given the
7 December 31 drop dead date for the settlement to be
8 effective. And the timing that you've just walked through
9 and that the motion just walks through in order to meet that
10 date, you need to have an order entered by the 8th of this
11 month. And, of course, at that point, people would be
12 working on New Year's Eve, so it's better to do it before
13 then.

14 The only thing I'll reiterate is that this time of
15 the essence problem is not one that anyone created to give
16 themselves any sort of advantage. As you noted, there are
17 multiple parties to the settlement agreement, including many
18 governmental entities, including the Northwest Mosquito
19 Abatement District, Hoffman Estates Park District, Poplar
20 Creek Library District, et cetera, and it clearly took time
21 for all of those public entities to work through the
22 settlement agreement that had been negotiated in September.

23 So you can email that order to chambers granting
24 the motion.

25 MR. FRIEDMANN: Thank you, Your Honor.

1 THE COURT: Okay. So then why don't we turn to
2 the underlying motion. And I'll note before you start that
3 I reviewed the motion and the two supporting declarations,
4 as well as the limited response of the Village of Hoffman
5 Estates, and also had a chance to review the proposed
6 revised order which clearly was intended to address that
7 limited objection, so I've been through that language that
8 was sent in earlier today.

9 MR. FRIEDMANN: Thank you, Your Honor, and I'll
10 keep my comments more narrow in light of the fact that
11 you're familiar with all of that already. So first of all,
12 again, thank you for making yourself available this
13 afternoon for this hearing given the timing issues that we
14 have.

15 And, again, we're before this Court this afternoon
16 respectfully requesting that Your Honor issue an order today
17 approving a global settlement agreement that resolves what
18 has been referred to as the EDA litigation, and as Your
19 Honor noted, it's been subject to much litigation, both in
20 this Court as well as in Cook County, and also a series of
21 tax assessment issues that concern the Hoffman Estate
22 campus.

23 And we're very pleased to have gotten to this
24 placed. Needless to say, it has not been an easy road, but
25 critical to the estate. If approved, this global settlement

1 will bring in some \$12.35 million into the estate within the
2 next few weeks.

3 We're also pleased, though not surprised, by the
4 strong support for the settlement agreement that we've
5 received from both the unsecured creditors committee and the
6 pre-effective date committee.

7 As you noted, there was a limited objection to the
8 settlement agreement filed by the Village, which is also one
9 of the principal parties, and as well as a filing of a
10 notice by a party for the settlement agreement, they
11 (indiscernible). Here, it also was not a surprise. Rather,
12 we all believed it was necessary to inform the Court of the
13 status of the approvals by the various taxing authorities
14 that are parties to the agreement.

15 And as I mentioned, although we hope to have all
16 of those approvals complete by this afternoon, and we're
17 very close to being there, there are still three taxing
18 districts that still need to complete their process, which
19 we expect to occur very shortly.

20 And for that reason, as you mentioned, we filed
21 this afternoon the revised proposed order at ECF 10121 to
22 address that issue. As a result and as reflected in that
23 revised proposed order, we are seeking authorization for the
24 Debtors to enter into the settlement agreement, as well as
25 approval of the settlement agreement, subject to the filing

1 of a notice that the outstanding written approvals and
2 authorizations from those three taxing districts have been
3 provided to the Village.

4 And just for the benefit of the Court and the
5 other parties listening, assuming that the Court enters the
6 order today, we understand that the Village has a board
7 meeting scheduled for December 13th to approve the
8 settlement agreement or to conditionally approve it subject
9 to the receipt of any outstanding written approval if that's
10 still an issue at that point.

11 And then after the 14-day period following the
12 entry of this Court's approval of the settlement, the
13 Village would have an emergency board meeting at which to
14 approve the ordinance dissolving the EDA so that it can be
15 entered and published prior to the December 31, 2021
16 deadline.

17 And as I mentioned under the terms of the
18 settlement agreement, the Debtors would receive their \$12.35
19 million payment within five business days of the publication
20 of that ordinance.

21 Your Honor, at this point, unless you have any
22 other questions, I'll otherwise rely on the arguments in
23 support set forth in our papers and the declarations of Mr.
24 Griffith and Mr. Martin, and on behalf of all the parties to
25 the global settlement agreement respectfully request that

1 the Court enter today the revised proposed order approving
2 the settlement agreement. Thank you.

3 THE COURT: Does anyone have anything further to
4 say on the motion?

5 MR. SCHEIN: Good afternoon, Your Honor. Michael
6 Schein, Vedder Price, on behalf of the Village of Hoffman
7 Estates.

8 I concur with the presentation made by Debtors'
9 counsel. It's been a long road to get here, but we're close
10 and we hope to get those last approvals through to the
11 Village for their board to sign off and to complete the
12 steps and processes outlined in the settlement agreement.

13 THE COURT: Okay.

14 MR. GENSBURG: Your Honor, Matt Gensburg on behalf
15 of Community Unit School District 300.

16 We also support this motion. I think, in fact,
17 there's only one taxing agency we're still waiting for their
18 formal approval and not three. But we're all working in the
19 same direction, it's moving forward, and we support this
20 motion.

21 THE COURT: Okay, thank you. All right, I just
22 have a couple of questions. But as far as the underlying
23 merits of the settlement are concerned, I think it's clear
24 that what is described in the motion and the economic terms
25 of the settlement agreement are fair and reasonable and a

1 proper exercise of the Debtors' judgment.

2 The settlement is clearly negotiated at arm's
3 length and in good faith. It also had the benefit of an
4 active mediation with a mediator's offer culminating months
5 of negotiations. It appears to me to reflect appropriately
6 the negotiating leverage that the Debtors had on the two
7 issues that are being settled, and it's unopposed and the
8 motion states that it's actually supported by the unsecured
9 creditors' committee and the post-confirmation
10 administrative expense committee.

11 My question on the settlement is this: On Page 12
12 of the settlement in the section dealing with what affects
13 the Village, it says in (c) that it shall use any of the --
14 I'm sorry, maybe this is and the school district too --
15 shall use -- yeah, and this is the school district -- "Shall
16 use any and all EDA funds paid to the school district
17 pursuant to this settlement agreement to satisfy its
18 obligations, including, first, to comply with the terms of
19 the Transform settlement agreement unless Transform and the
20 school district agree otherwise."

21 So just leave that thought there. There is that
22 settlement agreement, although I didn't approve it from the
23 Debtors' point of view, and that's what gave them some
24 leverage that's being settled as part of this motion.

25 And then (e) says, "Shall within 10 business days

1 following the EDA dissolution entry date file with the
2 Bankruptcy Court the stipulation irrevocably withdrawing
3 designation of Transform Holdco LLC of Search economic
4 development agreement, the designation rights stipulation,
5 effective as of the EDA and dissolution effective date,
6 substantially in the form attached hereto as Exhibit D."

7 And I think that's important because, otherwise,
8 if you don't have Transform on board with the withdrawal,
9 then there are issues as to the Debtors' ability to reject,
10 I think. So where does that stand? Is Transform on board
11 with this? They're not a party to the agreement. I just
12 want to know where we are on that.

13 MR. GENSBURG: Your Honor, Matt Gensburg. I can
14 address the Court, and I also have Kenneth Florey on by
15 telephone who's my co-counsel, and if the Court will allow
16 him to speak from the phone --

17 THE COURT: Sure, that's fine.

18 MR. GENSBURG: -- could add to that. We do have a
19 settlement agreement with Transform Holdco. They already
20 have provided us with the designation or the power of
21 attorney to withdraw their designation to this agreement,
22 which we're holding --

23 THE COURT: Okay.

24 MR. GENSBURG: -- subject to this settlement
25 agreement being finalized and implemented. So these two

1 agreements are tied together from our perspective and,
2 assuming that the settlement agreement Your Honor is
3 considering right now is approved and goes effective, we
4 have the ability and the power to withdraw the designation
5 pursuant to the prior agreement with Transform Holdco.

6 THE COURT: Okay.

7 MR. GENSBURG: And if I said anything, Your Honor,
8 that Mr. Florey thinks needs to be expanded on or is
9 incorrect, I just invite him to speak up.

10 THE COURT: Okay. Well, he's not speaking up, so
11 that's a --

12 MR. FLOREY: I have nothing more to add, Judge.

13 THE COURT: Okay, very well. Thank you. But my
14 other question is on the order, and actually, there are a
15 couple I suppose.

16 In Paragraph 2, it says, "Pursuant to Bankruptcy
17 Rule 9019(a), the Debtors are authorized to enter into the
18 settlement agreement, and the settlement agreement is
19 approved subject to the filing of a notice that the
20 outstanding written approvals and authorizations required
21 under the terms of the settlement agreement from...", and
22 then it lists the three of the taxing authorities, "... have
23 been provided to the Village the settlement approval notice
24 defined term."

25 So my question is where is it contemplated that

1 this notice will be filed? Is it to be filed on the docket
2 of this case, which I'm happy with and may be good so that
3 everyone knows that that's the trigger; is that what people
4 have in mind?

5 MR. FRIEDMANN: Yes, Your Honor. Jared Friedmann
6 again for the record. That, in fact, is the idea is that we
7 would file it on the docket in this case so that the world,
8 as well as the Court, will know that took place and,
9 therefore, this condition to everything becoming effective
10 has, in fact, occurred.

11 THE COURT: Okay, great. And then, so why don't
12 we just say subject to the filing on the docket of this case
13 so that it's clear.

14 And then in Paragraph 3, it says, "Subject to
15 filing of this settlement approval notice, the parties,
16 including without limitation the Village and the Cook County
17 Treasurer, are authorized and directed to take any action as
18 may be necessary or appropriate to implement, effectuate,
19 and fully perform under the settlement agreement."

20 And I just want to make sure, sometimes parties to
21 settlement agreements are taking actions that are sort of
22 preparatory to getting the agreement ready, and you could
23 read this to say that you couldn't take any of those
24 preparatory actions until this notice is filed.

25 I don't know if that's a problem here, but you've

1 already said that the agreement itself is authorized only
2 when the notice is filed. But if you want people to start
3 taking some actions to get ready, you may not want to have
4 this phrased this way in Paragraph 3.

5 MR. SCHEIN: Your Honor, it's Michael Schein on
6 behalf of the Village. We've walked through almost all the
7 steps that are necessary are all triggered by the settlement
8 going effective. Everything beforehand, the only thing
9 outstanding are the open notices noted in Paragraph 2.

10 THE COURT: All right.

11 MR. SCHEIN: So there are no steps that would need
12 to be taken. Everything following from the effective date
13 of the settlement.

14 THE COURT: Great. Then there doesn't need to be
15 a change, I think. I mean, I just didn't want someone in,
16 you know -- and this is not a knock on anyone who working
17 for a taxing authority -- to say, well, I can't do anything
18 until -- and they need to do something, but it doesn't sound
19 like that they need to do anything until the notice is filed
20 anyway.

21 Okay. Those are my only questions on the motion,
22 and you've answered them, so I will grant the motion, again,
23 as a fair and reasonable settlement. I know it took a long
24 time and people put a lot of hard work into both the
25 litigation and the settlement, but it's a fair resolution

1 obviously given the unanimous support of it and the
2 description of it.

3 So you can just mail that revised order to
4 chambers and it will be entered today. And just for the
5 record --

6 MR. FRIEDMANN: Thank you very much, Your Honor.

7 THE COURT: -- I have no problem waiving any 14-
8 day stay that is waivable under the bankruptcy rules, again,
9 for the same reasons that I've granted the motion to shorten
10 notice, so that paragraph is fine that's in the order.

11 MR. FRIEDMANN: Thank you, Your Honor.

12 THE COURT: All right. Thanks everyone.

13 MR. FRIEDMANN: Thank you very much. Have a good
14 weekend.

15 (Whereupon these proceedings were concluded at
16 2:23 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: December 6, 2021

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